



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Osler

v

Osler Brothers and Others

Heard at: Norwich

On: 16 & 17 July 2020

Before: Employment Judge S Moore

Appearances

For the Claimant: In person

For the Respondent: Mr Selwood, Counsel

JUDGMENT

- (1) The claim for unlawful deduction from wages succeeds in the sum of £3,084.52.**
- (2) The claim for compensation for unpaid holiday succeeds in the sum of £3,180.81.**
- (3) The claim for constructive unfair dismissal succeeds.**
 - (i) The amount of the basic award is £7,728.05.**
 - (ii) The amount of the compensatory award is £11,331.71.**
- (4) The total award is £25,325.09.**

REASONS

The Facts

1. This is a claim for unlawful deduction of wages, compensation for untaken annual leave and constructive unfair dismissal. I heard evidence from the Claimant, from Mr Kevin Osler (K), Mrs Carol Osler (C), and from Mrs Angela Thompson (A). I was also referred to two large bundles of documents. On the basis of that evidence, I make the following findings of facts.

2. The Respondent is a family run farm. It was initially owned by the Claimant's grandfather. In 1982 the Claimant's father, Roger Osler (R), and K were made joint partners. When the Claimant's father passed away R & K worked the farm, together with the Claimant. The Claimant grew up on the farm and was formally employed by the Respondent as a farm worker from 5 September 1994. On 2 October 2019 he informed the Respondent that he regarded the employment contract as having terminated.
3. In about 2015 the relationship between R & K began to break down because of a dispute about the potential sale of K's share of the farm to R, and the price of any such sale. In April 2017 K decided he did not want to work the farm any longer and left. In K's absence the farm continued to be run by R and the Claimant. By this time the division between the family members was so deep and bitter that R and K were no longer on speaking terms. A, the sister of R and K, is employed by the Respondent to do book-keeping and wages, which required her to pay the Claimant's wages. In the family split she had taken K's side, which meant that she too was not on speaking terms with R. The Claimant's own relationship with K and A had in the past been very good, but was badly affected by the partnership dispute between R and K.
4. In his claim for constructive dismissal the Claimant raised a number of historical problems about his employment. The issues of underpayment of holiday pay, not being allowed to take holidays, and being underpaid wages are dealt with in his claims for unlawful deduction of wages and holiday pay. The other matters of which he complains are no more than background to the central plank of his claim for constructive dismissal which centres on the events immediately after his father's death.
5. In 2019 R was diagnosed with cancer and he died quite suddenly on 15 June 2019. The Claimant continued to work and manage the farm on his own until his father's funeral on Friday 5 July 2019.
6. On Sunday 7 July 2019 the Claimant returned to work to level the potato headlands and tidy up, and discovered that K had changed the locks on all the farm sheds.
7. On the morning of 8 July 2019, the Claimant arrived for work and, since he was locked out of the sheds, waited for K to arrive. The Claimant had not had any contact with K for several months and neither K nor A had attended R's funeral. K blamed the Claimant for not allowing them to attend the funeral while the Claimant said that this had been R's wishes, not his own. In any event, R's death was not seen as an opportunity for reconciliation and instead increased the family rift. K's first words to the Claimant were, 'are you here to work then, or what?' and he did not refer to R or the Claimant's bereavement. The Claimant said that he was there to work but that he would need a key for the new locks otherwise he could not do his job. K refused to give the Claimant a key for the new locks because "he (K) had been locked out for long enough". K then drove a tractor out of the shed for the Claimant's use and locked the tractor shed behind him. He told the Claimant to spray the potatoes and the land near the beet factory. K then got the sprayer out of the shed and locked the door to the sprayer shed behind him. Subsequently the

Claimant discovered that a chemical he needed to do the spraying was in one of the locked sheds which he did not have access to, however by this time K had gone. The Claimant found another job to do instead and waited for K to return. During that period of time he became very upset. He considered that despite the shock and grief of his father's death he had continued to run the farm on his own during the previous three weeks yet K had made it clear by his actions that he did not trust the Claimant and did not want him to work on the farm. The Claimant made an appointment with a doctor for that afternoon and when K returned the Claimant told him that he was leaving to attend that appointment.

8. At the doctor's appointment the Claimant was signed off work for two weeks on the basis of "stress at work". He continued to be signed off work with stress until he resigned on 2 October 2019.
9. Shortly after the Claimant emailed a copy of his first sick note to K, K also changed a lock on a gate that prevented the Claimant having vehicular access to Four Scores Bungalow. This was a property that R had permitted the Claimant to live in. Although the Claimant had not lived there for some time, due to the building having subsidence problems, the Claimant was still in the process of moving out his furniture and attended the property to feed his cats. The Claimant continued to pay the council tax and other running costs of the property. By various emails of 14 July 2019, the Claimant asked for a key to the new lock or the old combination lock to be put back on, but K refused and said that the Claimant should ask him when he needed access. Notably the Claimant did not have K's telephone number and only communicated with him by email. On 25 July 2019 Marlene Osler (the Claimant's mother), wrote on behalf of the executors of R's will, which included the Claimant, asking for a set of keys for the sheds and gates at the farm. By email of the same date, K refused, stating that the executors did not have any say in the running of the farm, which fell on him as the only remaining partner, and that if they needed access they would have to arrange a mutually convenient time and day.
10. On or about 18 July 2019, the Claimant should have received a pay cheque but did not. The Claimant was paid a regular payment of £1000 per month for working 39 hours per week. His overtime hours were paid separately. The Claimant admitted that he frequently submitted his overtime hours to A several weeks late however the payment of £1000 was not referable to overtime and did not depend on him providing his overtime hours to A. As at 18 July 2019, the last payment the Claimant had received was for tax week 8, namely up to 23 May 2019.
11. On 2 August 2019, there was an exchange of emails between the Claimant and K in which K asked what wheat varieties were on the fields. The Claimant stated that "due to upset caused by you I have no wish to be in contact with you in any way shape or form" and to "please leave him alone" and only contact him through his mother's email address. The Claimant also stated that although he kept being asked "about stuff" he had not been paid for nearly three months.

12. On 15 August 2019 the Claimant sent K an email asking again for the lock to Four Scores to be removed and stating that he had still not been paid any wages for the last three months. K didn't reply.
13. On 22 August 2019 the Claimant sent A an email stating that he needed to be paid. A didn't reply.
14. On 31 August 2019 the Claimant sent A another email asking why he hadn't been paid. A didn't reply.
15. On 7 September 2019 the Claimant emailed A asking why she was ignoring his emails and why he had not been paid. A didn't reply.
16. On 7 September 2019 the Claimant also emailed K asking why both he and A were ignoring his emails and why he hadn't been paid, pointing out again that he hadn't been paid since May. He also attached further copies of all his sick notes to date (which he had supplied previously). K didn't reply.
17. In evidence K said that he didn't pay the Claimant because the Respondent's business account had been frozen after R's death and he blamed the Claimant for the fact of it being frozen.
18. On 24 September 2019 R's executors received a letter from K's solicitors. The letters states "We should be grateful if you would clarify the position with regard to [the Claimant's] health and whether he wishes to work for K in the future. Assuming that he does not then the informal arrangements that have existed to date need to be formalised to terminate the arrangements. We would be grateful if you would address by [11 October 2019]".
19. By this time the Claimant considered he had exhausted all options as regards obtaining his owed pay and sick pay. He stated, and I accept, that he felt he had been pushed into a corner and had no option but to leave. He stated that he took legal advice but was told he could not force K to pay him. It was put to the Claimant that he had been intending to leave in any event, and had no intention of working with his K. The Claimant was shown an email dated 14 July 2019 where the Claimant states, in relation to Four Scores, "I need a key and access to the house at all times until I leave." The Claimant disputed this. He said that the email was referring to leaving Four Scores, not leaving his employment. He said that the farm had been his whole life, that he earned his living from the farm, and that it broke his heart to leave, but that he could not carry on financially or emotionally. I accept that evidence.
20. On 2 October 2019 the Claimant submitted a letter to K and the Respondent. The letter stated that he wished to raise a grievance about the fact that he had been dismissed without warning for reasons that were unclear, and that he was entitled to a hearing to discuss the matter. In cross-examination the Claimant said he had taken the letter off the internet, and that because he hadn't been paid or had any contact from R or A he felt that he had been dismissed. It was put to the Claimant that he hadn't mentioned his pay or his contract, and he said he wasn't a lawyer and that the main reason he had resigned was because he hadn't been paid.

21. As regards his claim for unlawful deduction of wages, in his first schedule of loss the Claimant stated he was owed net wages estimated to be £6,771.04 of which the Respondent had paid £4,300.59, leaving a claim for unpaid net wages of £2,470.45. He also claimed he was owed unpaid pension contributions of £1,598.80 of which the Respondent had paid £956.89, leaving a claim for £641.91.
22. In his second schedule of loss the Claimant claimed owed net wages of £8,964.83, of which the Respondent had paid £4,300.59, leaving a claim for unpaid net wages of £4,664.24. He also claimed he was owed unpaid pension contributions of £1,040.90, interest of £98, of which the Respondent had now paid £984.96. leaving a claim for £56.94, plus interest of £98.00.
23. To support his claim the Claimant produced very detailed spreadsheets, which began in March 2017, setting out how he had calculated his losses. The amount claimed of £4,664.24 for owed net wages in his spreadsheet tallies with the amount claimed in his second schedule for owed net wages
24. In evidence the Claimant stated that he had great difficulty working out precisely what was owed to him because of missing wage slips and difficulty obtaining the Respondent's bank statements. Further he had repeatedly asked the Respondent for a copy of the relevant pages of wages book used by A but had only been given a copy two days before the hearing. He accepted that he could not be sure his claim was accurate, but he had done his best.
25. A submitted a lengthy and detailed statement responding in detail to the Claimant's claims for unpaid wages, holiday pay and underpaid pension contributions. Mr Selwood accepted that this statement set out the Respondent's position in respect of these claims.
26. A concluded that having reviewed the wage book and emails from the Claimant he had been underpaid the following:
 - (i) A gross payment of £850.63 for 62.5 hours of overtime between 30 March and 26 April 2017;
 - (ii) A gross payment of £27.22 for 2 hours of overtime between 27 April and 24 May 2017.
27. In cross examination, the Claimant took A to paragraph 62 of her statement, where, in respect of the period 14 September – 11 October 2017, she stated, "the claimant was also paid an additional payment of £1,602.32 during the course of this month." The Claimant stated he had never received this cheque and referring to Respondent's bank statements he pointed out there was no evidence this amount had been paid to him, then or at all. A responded that her witness statement had been written by a solicitor who may have put in the statement what ought to have happened rather than what did in fact happen.

28. The Claimant also took A to paragraph 77 of her statement where she stated, "the claimant was also paid an additional payment of £1,482.20 during the course of this month." The Claimant stated he had never received this cheque either and referring to Respondent's bank statements he pointed out there was no evidence this amount had been paid to him, then or at all. Again, A responded that the witness statement had been written by a solicitor who may have put in the statement what ought to have happened rather than what did happen.
29. Further, in the course of the hearing the Respondent agreed that it owed the Claimant £3,180.81 by way of unpaid holiday pay.

Conclusions

(i) Unpaid Wages

30. Mr Selwood submitted that the Claimant had not sufficiently particularised his claim for unpaid wages, the amount he had claimed had changed and he had not discharged the burden of proof of showing that the sums now claimed were due. Further as regards the sums admitted by A as owing in her witness statement, these underpayments had occurred more than two years before the Claimant brought his claim and he was therefore prevented from claiming them by reason of section 23(4A) Employment Rights Act 1996 (ERA).
31. I find that the Claimant has sufficiently particularised his claims. The difference between the first and second schedule of loss is explained by the fact of the Claimant receiving further information. Further, the amount claimed in the second schedule of loss is particularised by the Claimant's spreadsheets, with which it tallies.
32. In response to that claim, the Respondent has presented a lengthy and detailed rebuttal in the form of A's statement.
33. In that statement A accepts that the Claimant was underpaid gross wages of £877.85 between March and May 2017, however, as submitted by Mr Selwood, the Claimant is prevented from claiming this amount by reason of section 23(4A) ERA.
34. Further, in the course of cross examination, the Claimant also established that A's statement was incorrect in two material respects, namely that the sums of £1,602.32 and £1,482.20 were not paid to the Claimant despite A assuming and stating that they had been. The Claimant is not prevented from claiming these amounts because they relate to a period less than two years prior to the presentation of his claim.
35. As regards the Claimant's claim for underpaid pension contributions, he did not challenge A's evidence in this respect and therefore this aspect of his claim is dismissed.

36. I therefore find that the claim for unpaid wages succeeds to the amount of £3,084.52 (£1,602.32 + £1,482.20).

(ii) Holiday Pay

37. The Claimant's claim for unpaid holiday pay succeeds to the amount of £3,180.81, as accepted by the Respondent.

(iii) Constructive Unfair Dismissal

(a) *Liability*

38. For a constructive dismissal claim to succeed, four limbs have to be satisfied: that there was a breach of the employment contract, that it was a fundamental breach that went to the root of the contract, that a claimant resigned in response to that breach, and that he did not affirm the contract before doing so.

39. Mr Selwood submitted that the locking of the farm buildings and vehicular access to Four Scores was not a breach of the Claimant's contract because K was entitled to secure the properties and access to them. I don't accept that submission because I don't accept that K's actions were taken on security grounds. Had K simply been concerned about security he would have given the Claimant a key to the new locks. Rather, the new locks were an act of retaliation and assertion of control born of the family dispute and K's belief that in the past he had been locked out of the farm by R and the Claimant. However, given the Claimant's evidence that the main reason he resigned was because he was not paid, and Mr Selwood's (entirely correct) concession that the Respondent's failure to pay the Claimant his wages and sick pay was a fundamental breach of his employment contract, the legal implications of K's actions with respect to the farm buildings and Four Scores are not material.

40. As regards the non-payment of the Claimant's wages and sick pay, Mr Selwood submitted that although this was a fundamental breach of the employment contract, the Claimant had not resigned in response to it. He submitted the Claimant was not overly concerned about his pay, as he hadn't put in a claim for the overtime hours that he had worked immediately prior to going on sick leave until August, and his resignation letter didn't mention his pay. I don't accept that submission. The Claimant was plainly concerned about being paid; between 15 August and 7 September 2019 he sent K and A five emails asking to be paid. As regards his resignation letter of 2 October 2019, the contents bear little legal relation to the situation at the time, but that is because the Claimant has no legal training and simply took the letter from the internet as it appeared to be relevant. I accept his evidence that because he hadn't been paid, or had any response to his emails to K and A asking to be paid, he thought he had been dismissed and find that the fact of not being paid was the reason the Claimant's employment terminated.

41. I therefore find that the Claimant was constructively dismissed and since the Respondent has not put forward any potentially fair reason (or any reason) for the dismissal, it follows that the claim for unfair dismissal succeeds.

(b) Remedy

42. The Claimant's basic award is calculated by reference to his weekly pay which, for this purpose is calculated in accordance with Chapter II of Part XIV of the ERA. In particular, to assess weekly pay a claimant's earnings during the 12-week period prior to the termination of his employment are to be ascertained and averaged.

43. Mr Selwood submitted that since the Claimant was on sick leave during that 12-week period, his basic award must be calculated on the basis of the sick pay to which he was entitled, namely £362.70 per week, and relied on Toni & Guys (St Pauls Ltd) v Georgiou UKEAT/0085/13/DM as authority for the proposition that there is no discretion to depart from the statutory requirement to consider actual earnings during the relevant 12-week period; even if an employment tribunal found that during that period a claimant's earnings had less because of the unfair behaviour of the employer, it could not use average earnings from an earlier period of time.

44. However, the Claimant was an employee with "normal working hours" in that he was entitled to be paid overtime if he worked more than a fixed number of hours (in this case 39 hours) per week (section 234(1) ERA). Accordingly, section 223 ERA provides that for the purpose of calculating average pay during the 12-week period only the hours when the employee was working are to be taken into account. Since the Claimant was not working at all when he was on sick leave (unlike Mrs Georgiou who was working during the 12 weeks preceding her dismissal), I consider that his basic pay must be calculated on the basis of his earnings during the 12-week period immediately prior to the commencement of his sick leave. The best evidence I have of this is the figure I was given as regards the Claimant's average earnings during the 12-week period immediately prior to R's death, namely £396.31 per week, and I use this figure to calculate his basic award.

45. It is common ground that the Claimant had completed 25 years of continuous service at the date of his dismissal, that he was then aged 41 years, and that the correct multiplier is therefore 19.5. His basic award is therefore $19.5 \times £396.31$, namely £7,728.05.

46. Turning to the compensatory award, Mr Selwood submitted that this should be calculated on the basis of the Claimant's average weekly pay in the 12 weeks immediately prior to R's death, namely £396.31 per week. The Claimant submitted that his pay had been unusually low during that period because he had done less overtime as result of wanting to spend time with R and the time taken up with R's illness. He submitted that the compensatory award should be calculated on the basis of his average earnings as taken from his P60 the previous year, namely net earnings of £441.78 per week. I

accept the Claimant's submission. There are good reasons why the Claimant's earnings in the 12 weeks immediately prior to his father's death are likely to have been lower than normal, and no reason why his future earnings when working for K are likely to have been lower than his earnings when working for R the previous year.

47. As regards the period of loss, the Claimant is seeking compensation until the date of the hearing, namely 41 weeks of compensation. Since his dismissal he has found some farming work and earned £7,429 which he puts forward as mitigation.
48. Mr Selwood submitted that even if the Claimant had not been dismissed, he would have left soon afterwards because, given the poor relationship between them, he would not have been able to work for K. Alternatively K would have dismissed him fairly on the basis of a breakdown in their relationship.
49. However, the Claimant had spent the entirety of his working life on the farm. He said in evidence that the farm was not just his work but his life, and also that it was the place he felt closest to his father. In addition, the Claimant has two young children and was dependent on his wages from the farm. I therefore do not believe that after twenty-five years the Claimant would have given up his employment and left the farm unless forced to do so. Further, I am not satisfied the Claimant's employment would have terminated by way of a fair dismissal.
50. Alternatively, Mr Selwood submitted that the maximum time to which the Claimant ought to be able to claim compensation was April 2020. However, the difficulty with this submission is that in April 2020 the UK was in the worst grip of the Covid-19 pandemic and in lockdown, which made finding any work, even farming work, particularly difficult. Overall, I find that it is just and equitable to award the Claimant compensation to the date of the hearing and I am satisfied that he has made reasonable efforts to mitigate his loss.
51. It follows that for loss of salary he is entitled to an amount of 41 x £441.78, namely £18,112.98.
52. Mr Selwood accepted the sum put forward for loss of statutory rights of £300 and did not contest the sum put forward for loss of pension benefits of £347.73.
53. The Claimant also sought a sum of £948.00 in respect of the difference between his sick pay and his average pay during the period he was off sick. However, this is not a loss which flows from the dismissal and I reject this aspect of his claim.
54. It follows that taking account of the sums earned by way of mitigation the total compensatory award is £11,331.71.

55. It further follows that the Claimant's total award for unfair dismissal is £19,059.76.

Employment Judge S Moore

Date:7/9/2020

Sent to the parties on: 7/9/2020

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For the Tribunal Office